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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No. 397

BRADY TRANSFER & STORAGE COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF OF BRADY TRANSFER & STORAGE COMPANY, APPELLANT, IN OPPOSITION TO THE MOTION TO AFFIRM.

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BRIEF OF BRADY TRANSFER & STORAGE COMPANY, APPELLANT, IN OPPOSITION TO THE MOTION TO AFFIRM.

Questions presented.

Appellant, Brady Transfer and Storage Company, hereinafter referred to as Brady, respectfully urges this honorable Court to deny appellees' Motion to Affirm, filed in the Court below. Brady emphatically denies the representations made by appellees in support of their motion, and earnestly beseeches this Court to hear this appeal.

Appellees do not contend that this Court lacks jurisdiction, nor do they suggest that the appeal was taken for

delay only. They recognize that the case before the Commission was looked upon as a test case as to the legal questions involved, and that the decision is of importance, not only to Brady, but also to holders of irregular-route certificates generally. Yet the appellees move the Court to dispose of the case summarily. This procedure, however, is and should be followed only when necessary to cut off frivolous appeals, which is not the case here.

Brady's jurisdictional statement shows that this appeal presents five substantial questions of law which involve the construction and constitutionality of particular sections of the Motor Carrier Act, 1935 (49 U.S.C. §301, et seq.), and the extent of the authority conferred on the Interstate Commerce Commission thereby. These questions may be paraphrased as follows:

1. Does the Motor Carrier Act, 1935, either limit by its own terms, or grant the Commission the power to limit the methods, regularity, frequency or quantity of service which may be rendered by a common carrier of property to whom has been granted a certificate of public convenience and necessity to transport general commodities in both truckload and less-truckload lots over *irregular routes*—that is, routes of the carrier's own selection between authorized points?

2. Does the policy of the Motor Carrier Act, 1935, require the Commission to restrict, by classification or otherwise, the methods, regularity, frequency and quantity of service which may be rendered by such a common carrier of property for the purpose of protecting regular-route carriers (those whose highways are specified) from increased competition by the irregular-route carrier, both carriers being authorized to serve the same points?

3. Does not the proviso in Section 208(a) of the Act (49

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U.S.C. §308[a])[1] specifically prohibit the Commission from imposing restrictions on the method, regularity, frequency and quantity of Brady's operations such as is contemplated by the Commission's order in the instant case?

4. Assuming the Commission has the power sought to be exercised by its order, is not that order so uncertain as to violate due process?

5. Assuming that the Motor Carrier Act, 1935, purports to confer the power sought to be exercised, would not that make the Act unconstitutional in this respect because of a discriminatory classification?

Appellees' Motion to Affirm deals only with the first question. The remaining questions are ignored. As to the first question, appellees' principal contention is that it was set at rest (adversely to the Brady viewpoint in this appeal) by the affirmance on motion of the decision of the lower court in *Falwell* v. *United States*, 330 U.S. 807. A secondary contention of the appellees is that in *United States* v. *Maher*, 307 U.S. 148, this Court sustained a denial by the Commission to a common carrier of passengers of a certificate under the grandfather clause upon a construction of the Act which appellees claim is equally applicable to common carriers of property; thereby appellees urge that the first question should be answered in the affirmative, that is, against Brady. On these grounds, appellees assert that

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[1] Section 208(a) provides that certificates issued to common carriers by motor vehicle shall specify the service to be rendered, the routes, the fixed termini, the territory, etc. It grants the Commission power to impose reasonable terms, conditions and limitations in connection with certificates, subject to a proviso which reads as follows:

> *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

this appeal presents no substantial questions, and move for summary affirmance of the decree of the lower court.

Under points I and II below, we show that the grounds for appellees' motion are without validity. Under point III we show that the construction accorded the Act by the Commission and the lower court is directly opposed, in principle, to the construction which this Court gave the Act in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, and *Howard Hall Co.* v. *United States*, 315 U.S. 495. Under point IV, we show that all five questions presented for decision by this appeal are substantial questions which merit full and careful consideration by this Court after affording the parties the opportunity to file briefs and to present oral argument.

I. Brady sincerely believes that none of the questions presented for decision by this appeal were passed upon by this Court in its affirmance on motion in the Falwell case.

In the *Falwell* case, this Court, on motion, sustained a decree of the lower court which dismissed a bill seeking to enjoin an order of the Commission which denied an application under Section 5 of the Interstate Commerce Act (49 U.S.C. §5) for approval of a proposed purchase by one motor carrier of the properties of another motor carrier. In granting that motion, this Court simply said:

> The motion to affirm is granted and the judgment is affirmed. Secs. 5 and 17, Interstate Commerce Act, 54 Stat. 905, 913, c. 722, 49 U.S.C. Secs. 5 and 17.

Brady is not, of course, in a position to state the views which this Court held as to the proper construction of the Act or any section thereof when it granted the motion mentioned. To attempt such a statement would be presump-

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tuous. However, Brady sincerely believes that this Court did not intend to pass on any of the questions presented in this appeal. The basis for that belief is found in the history of the *Falwell* case and the particular questions involved therein.

In *Falwell Fast Frt., Inc.-Purchase-Draper and Evans Line, Inc.* (1946), 40 M.C.C. 439, the applicant was denied approval under Section 5 of the Interstate Commerce Act of a proposed purchase of an irregular route certificate between the fixed termini of Roanoke and Lynchburg, Va. The applicant owned certificates authorizing operations over regular routes which were in two unconnected parts, the hiatus being between the points mentioned. It proposed to unify the purchased rights with its rights over specified highways and to operate a regular through service.

The commission denied that application upon the finding that it "had not been shown to be consistent with the public interest (pp. 443, 444). For one ground, the Commission held that the irregular-route right sought to be transferred constituted one segment of a larger grant which should continue to be operated as a whole since otherwise there would be a "split" of a single right (p. 442). For another ground, the Commission held that the proposed through operations would be unauthorized under the theory of the law on which the Commission acted in the instant case (p. 443), that is, that they would constitute an unlawful conversion into so-called "regular-route" *services* which the Commission viewed as beyond the authority granted by a certificate which specifies irregular routes.

In *Falwell* v. *United States*, 69 F. Supp. 71, a statutory court sustained the order of the Commission and accepted as proper the construction which the Commission placed on the Act. On appeal to this Court, appellees filed a Motion to Affirm. Undersigned counsel appeared and filed their

brief as *amici curiae* to oppose that motion. In that brief, we urged that the second ground on which the Commission rested its order involved an erroneous construction of the statute and that the lower court was in error in sustaining the Commission on that point. However, we offered no opposition to that Motion to Affirm if this Court viewed the order of the Commission as sustainable on grounds severable from the question of permissible service over irregular routes; that is, if sustainable as within the field of permissible administrative discretion under Section 5, without regard to the Sections of the Motor Carrier Act, 1935, involved in the instant case. As to what are the limits of that field, we took no position in that brief.

Counsel for the Regular Route Common Carriers Conference of the American Trucking Association, Inc., intervening defendant in the lower court in the instant case, also filed a brief as *amici curiae* in the *Falwell* case. They supported the Motion to Affirm and went even further in minimizing the relevancy of the regular-route conversion theory. They urged this Court to affirm on the sole ground that the Commission's action was within the permissible limits of administrative discretion under Section 5[2].

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[2] On pages 11 and 12 of their brief, they said:

> We have been advised, informally, that the Irregular Route Common Carrier Conference expects to argue that there is presented here the broad general issues involving the distinctions between the service which regular-route carriers and irregular-route carriers may render under certificates issued under Section 208. Assuming that our advice is correct, *it is our position that the Commission's power and discretion under Section 5 are entirely distinct from the question of permissible service under Section 208.* Here the Commission had ample grounds to deny Falwell's application under Section 5 and we submit that the *Falwell* case should be decided in the light of the Commission's discretion with respect to mergers under Section 5. Presumably the Irregular Route Common Carrier Conference may refer to a so-called *Brady* case, which is pending before the Commission and for that reason we wish

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The circumstances just described, and the phraseology used by this Court in granting the Motion to Affirm in the *Falwell* case, leads Brady to believe that this Court affirmed the decrees of the lower court for reasons different from those stated in the opinion of that Court, those reasons being quoted in footnote 4 in appellees' Motion to Affirm in this case.

But in addition, we respectfully submit that even if this Court viewed the reasoning of the lower Court in the *Falwell* case as apparently sound, it should nevertheless accord Brady an opportunity to be heard on brief and at oral argument in the instant case. This case involves exceedingly important and substantial questions of statutory construction and constitutional questions which were not discussed by the lower court in the *Falwell* case. That is true as to questions Nos. 2, 3, 4 and 5 as above stated. Further, the lower court in the *Falwell* case apparently gave no consideration to the legislative history in reaching its conclusions as to the proper construction of the Act. That legislative history throws an entirely different light on the questions involved and merits the careful consideration of this Court before a decision is reached in the instant case.

Finally, this Court was not provided with complete briefs and did not hear oral arguments in the *Falwell* case. The instant case is looked upon by the industry and the Commission as a test case. In such a case, it would best serve the public interest if this Court were well advised by briefs and oral arguments before it arrives at its final decision.

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to point out that the *Brady* case involves a charge of rendering service in excess of certificated authority, whereas the issues in the *Falwell* case involved consistency with the public interest under Section 5. We believe that there are no good reasons for confusing the issues in the *Falwell* case by reference to such issues as may at a later time arise under the *Brady* case.

II. The Maher case does not control this case.

In order to determine the extent to which the instant case is similar, if at all, to the *Maher* case, it is necessary to note how that case arose, what was decided therein, and the grounds for the decision, and to note, in contrast, how this case arose, what was decided therein, and the grounds therefor.

The *Maher* case involved the validity of the Commission's action in *Maher Common Carrier Application*, 3 M.C.C. 479, in denying a certificate to a carrier of passengers which claimed grandfather rights. The controlling circumstances were as follows: On May 29, 1936, which was after the critical date for determining grandfather rights, Maher instituted a regular bus operation on schedule between terminals at Portland, Ore., and Seattle, Wash. The operations which he had conducted prior thereto were described by the Commission as follows (3 M.C.C. 479, 480):

> Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon, with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps.

This Court noted (p. 151) that the evidence before the Commission showed "rare trips to Seattle, no service at all to most of the intervening points, and no showing that passengers were transported on return trips to Portland."

The Commission denied the Maher application upon a

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finding that he had failed to show that the services for which a certificate was sought had been conducted by the applicant on the critical date, June 1, 1935.

Speaking to the situation before it, this Court approved the action of the Commission in differentiating between "'anywhere-for-hire' bus operations over irregular routes and regular-route bus operation between fixed termini." It held that the Commission rightfully rejected the application because "the new regular route of appellee was not in existence on June 1, 1935, and the irregular 'anywhere-for-hire' service was not 'so operated' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate."

Both this Court and the Commission took the view that Maher had abandoned the operations in the carriage of passengers conducted on June 1, 1935, and prior thereto, and in lieu thereof, had substituted distinctly new and different operations.

The complaint in this case filed in the lower court and the reports of the Commission attached as appendices thereto, show that the questions here involved arise under the following circumstances. Within the time required by the Act, Brady applied to the Commission for a certificate of public convenience and necessity as a common carrier of property by motor vehicle based on operations alleged to have been conducted in the "grandfather" period. That application sought certain regular-route authority in interstate commerce in Iowa and very extensive irregular-route authority between points in Iowa and points in other states, including twenty-one points in Minnesota[3]. Pending action

[3] The appendices to the report of the Commission in *Brady Transfer & Storage Company Common Carrier Application*, 23 M.C.C. 767, 783, describe the points and territories covered by Brady's application under the grandfather clause of Section 206(a) of the Motor Carrier Act, 1935.

on the application, Brady was permitted, under the statute, to continue all of the operations for which a certificate was sought. After hearings and three reports, the last one dated September 7, 1944[4] the Commission issued a certificate to Brady under the grandfather clause which covered, among others, operations in the transportation of general commodities over irregular routes between four points in Minnesota (including Minneapolis and St. Paul), on the one hand, and on the other, all points in Iowa.

In 1940, Brady undertook, through solicitation, improved service, and added facilities, to increase the traffic handled to and from the Twin Cities. In the interest of an economical and efficient operation, it set up a terminal at the Twin Cities and the business transported thereto and from was funneled through subterminals at Ft. Dodge and Spencer, Iowa. Thereupon, at the instigation of certain competitors holding certificates over regular routes between the points just mentioned, that is, via specified highways, the Commission instituted the investigation in which it finally issued the order involved in the instant case (*Transportation Activities, Brady Transfer & Storage Co.* [Feb. 7, 1947] 47 I.C.C. 26).

In its report made a part of that order, the Commission found that Brady had no right under its irregular-route certificate to conduct operations between the Twin Cities and Ft. Dodge and Spencer, such as those conducted after 1940. The Commission listed eight characteristics of the service which it held were collectively unauthorized. To these eight characteristics, the Commission applied the following terms: 1) predetermined plan; 2) character of traffic, that is, predominantly in small lots; 3) solicitation; 4) ter-

[4] The third report of the Commission in Brady's certificate case is noted at 43 M.C.C. 834, but is not reported in full. That report is attached as Appendix C to Brady's complaint in the District Court.

minals and call stations; 5) fixed routes; 6) fixed termini; 7) periodicity of service; and 8) schedules or their equivalent. The Commission found that while each characteristic considered individually did not mark an unauthorized service, yet, when all eight characteristics existed in Brady's operations, they reflected a "type of service" not authorized by his certificate which does not specify the precise highways to be traversed.

The Commission did not, however, find that Brady had abandoned a service conducted in the grandfather period or that Brady had substituted a distinctly new and different service in lieu thereof. It simply concluded that Brady was performing too much service between the points and over the highways which he was authorized to serve.

The Commission did not, however, specify the precise limits for the service which Brady is permitted to render under its certificate as construed by the Commission. It suggested that Brady would be on the safe side if he discontinued all eight of the practices mentioned by the Commission. However, the Commission also said (47 I.C.C. 56, italics ours):

> . . . If respondent feels that the terms of compliance outlined above are too onerous; and if it feels that it can make changes in its present operation which will bring them within its present authority and at the same time retain, or continue, any of the practices which originated with, and marked the unlawful conversion of, its original irregular-route service into a regular-route service, it is free, *at its peril*, to take such lesser action than that outlined above as it feels it can justify.

The sub-headings below indicate the principal reasons why the *Maher* case is not controlling on the instant case.

A. The cases differ fundamentally in respect to the powers sought to be exercised by the Commission.

In the *Maher* case, the Commission exercised the powers conferred in connection with the grant of a certificate. The Commission was there required to reject the application because it found that the applicant had abandoned one service and had instituted a distinctly new and different service, and that that circumstance took the applicant out from under the protection of the grandfather clause. In that case, it was correct to characterize the prior service as "anywhere-for-hire" because until a certificate is issued the law imposed no geographical limits on where a carrier may go under his general holding-out.

In the instant case, the certificate has been issued. The holding out is now co-terminus with the geographical specifications therein. The term "anywhere-for-hire" is either meaningless or contradictory when applied to the holding out under a certificate, even when no highways are specified (irregular routes), because the certificate definitely specifies geographical limits in terms of points and territories.[5] There is no claim that Brady abandoned an authorized service which has been certificated to him on the basis of operations prior to the critical date. Rather, the Commis-

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[5] The Commission failed to appreciate this obvious distinction between pre-regulation and post-regulation operations because in finding that the matter of a predetermined plan is a criterion of regular-route but not of irregular-route operation, it said (47 M.C.C. 23, 43; italics ours):

> . . . The significant thing is that from day to day and week to week the pattern of a regular-route operation is fixed to a degree inconsistent with a bona fide on-call *anywhere-for-hire service.*

sion and the lower court,[6] viewed the present operations as simply embracing methods, quantity, frequency and regularity of service *in excess* of that which is permissible between authorized points. The order seeks to restrain the performance of that excess. The power sought to be exercised in such a case is obviously different than the power exercised in the *Maher* case. That circumstance alone distinguishes the latter case.

Additionally, the *Maher* case did not touch, even indirectly, the question of the proper construction of the classification section of the Act (Sec. 204[b]; 49 U.S.C. § 304[b]) or the proviso which prohibits the imposition by the Commission of limitations on the quantity of service which may be rendered under a certificate (Sec. 208[a]). Nor did it touch the question of policy declared in the instant case to favor regular-route carriers. Furthermore, the *Maher* case involved no questions of due process like those involved in the instant case.

B. In the Maher case, the distinction between types of carriers in the passenger field rested on differences in the public undertakings of the carriers embraced in the two types. No such differences mark the alleged types of carriers in the property field.

When Maher instituted the "new" service which controlled the decision in the *Maher* case, he made a complete change in his public undertaking, that is, in the services held out. That necessarily made a change in his rights

[6] At the time appellants filed their Jurisdictional Statement in the lower court, they had been served with that Court's Findings of Fact and Conclusions of Law, but had not been advised that that Court had written an opinion. This explains the erroneous statement in the Jurisdictional Statement that the District Court wrote no opinion.

and obligations as a common carrier at common law. He had been engaged in charter or special operations of passenger groups. The scope of those operations were a matter of special agreement in respect to each trip and the agreements were made before any trip was undertaken. His new operations consisted of ordinary, over-the-road, terminal-to-terminal, bus operations over a specified highway. He no longer transported passengers from door-to-door. He transported only from terminal to terminal, or he picked up and discharged at intermediate crossroads. He handled individual passengers without any prior arrangements as to where they would be picked up or where they would be delivered. From the standpoint of the passenger, he performed an entirely different function.

His use of irregular, that is, unrestricted highways in the one case, and of regular routes, that is, specified or restricted highways in the other case, was purely incidental to the type of service which he performed. That difference as to highways was not the dominant characteristic of the types of passenger service involved. That is recognized in the documents cited by this Court in footnote 3 to its decision in the *Maher* case, which deal with legislative history.

In the instant case, the elements which define the public undertaking or the holding-out of a carrier of property are precisely the same whether the carrier uses irregular routes, that is, highways of his own choice from origin to destination, as whether the carrier uses regular routes, that is, service restricted to particular highways. There is a like similarity in respect to the common law rights, duties, and obligations of these carriers, whether the routes are fixed or not. *State* v. *Rosenstein* (1934) 217 Iowa 985, 990-991, 252 N.W. 251, 254; *Campbell* v. *A.B.C. Storage & Van Co.* (1915), 187 Mo. App. 565, 174 S.W. 140,

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142; *Stevenson & Co.* v. *Hartman* (1921), 231 N.Y. 378, 380-381, 132 N.E. 121, 122, 18 A.L.R. 1314, 1315; and *Walton* v. *A.B.C. Fireproof Warehouse Co.* (1941), 235 Mo. App. 939, 151 S.W. 2nd 494, 498, 499.

From the standpoint of a shipper of property, the function performed by a carrier over regular routes is identical with the function performed by a carrier over irregular routes. In both cases, the goods are simply taken from a store-door at origin and moved by whatever method the carrier deems most economical and efficient to a store-door at destination. Whether or not there are differences in periodicity, regularity, expedition and internal operating methods, nevertheless the holding-out, the public undertaking, and the function performed are the same in both cases.

The distinction between types of carriers in the passenger field rest on fundamental differences which have no counterpart in the field of common carriage of property. Under such circumstances, the principles declared in the *Maher* case have no pertinency to the first question presented.

C. There is a significant difference between the specific provisions of the statute which relate to common carriers of passengers over irregular routes and those which relate to common carriers of property over irregular routes.

The definition section (203(a)(14)) and the grandfather clause (206(a)) in the Motor Carrier Act, 1935, embrace both property carriers and passenger carriers over both regular and irregular routes. In this sense, it is correct to say that the Act "recognizes" a type of carrier over regular routes and a type of carrier over irregular routes. However, that recognition does not go beyond the point that in the one case it is recognized that the carrier may

chose the highways to be traversed between authorized points, while in the other case, the carrier is restricted to a particular highway. No question in this case is answered by simply noting that recognition in the statute. The real question is whether a carrier over irregular routes is limited, merely by reason of that irregularity in routes, to an irregular or limited service.

On this point, the Motor Carrier Act, 1935, contains a pertinent provision which directly couples irregularity in routes with a limited service in the case of passenger carriers, no similar provision being provided for property carriers. That special provision for passenger carriers is contained in Sec. 207(a) which provides generally for the issuance of certificates to both property and passenger carriers, subject to a proviso limited to the latter which reads as follows:

> That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

This means that common carriers of passengers authorized to operate over irregular routes are restricted to those engaged in special or charter operations. The two go hand in hand. Passenger carriers in the irregular route class are necessarily in a restricted service class under this provision of the statute.

The Act contains no similar provision with respect to common carriers of property. This difference in statutory provisions was proposed by Mr. J. B. Eastman when he was Federal Coordinator of Transportation and at the time he recommended to Congress the bill which finally became the Motor Carrier Act, 1935. Mr. Eastman ex-

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plained this difference in statutory provisions as follows (italics ours):

> In section 307 a proviso has been added to prohibit the issuance of a certificate to common carriers of passengers for operations over other than regular routes and between fixed termini, except in the case of special or charter operations. *The bus industry differs from the truck industry in that there is no substantial need for operation over irregular routes.* The prohibition which has been added is a necessary measure of protection for regular route operators. (House Doc. No. 89, 74th Cong., 1st Sess., p. 62.)

This difference in statutory provisions makes inapplicable to the instant case the distinction between types of passenger carriers involved in the *Maher* case.

D. The Commission holds that the Maher case is not controlling in the grant of grandfather certificates to common carriers of property under like circumstances.

The Commission itself has recognized that the *Maher* case is not controlling when the question is as to whether a certificate of public convenience and necessity should be issued to a common carrier of property under circumstances similar to those involved in the *Maher* case. By similar circumstances we mean the institution after the critical date of a repetitive, regular service between terminals over the same highways, the prior service consisting of an irregular service over a variety of highways throughout a territory which embraces the termini served by the subsequent, regular service.

This is illustrated by *Southern United Lines Inc., Com. car. Applic.* (1943), 42 M.C.C. 251, reversing a prior report (1940), 24 M.C.C. 241. That case is on all fours with the *Maher* case, except for the fact that it involved the grandfather application of a common carrier of property

rather than of passengers. In the grandfather period, the applicant in that case and its predecessor conducted a territorial, anywhere-for-hire operation over irregular routes. After the critical date, the applicant instituted a regular service between Greenville, S.C. and Atlanta, Ga. This change was made in September, 1938, when the applicant instituted "a daily operation between Greenville and Atlanta" (42 M.C.C. 257). After the change, the applicant "maintained terminals at both Atlanta and Greenville, and the regular route service between these points, which has been almost daily, has included service to the intermediate points on the highways used" (24 M.C.C. 245). While the points mentioned were within the applicant's territory, they were served only irregularly in the grandfather period. In the first report, the Commission, on the direct authority of the *Maher* case, denied the application for a grandfather certificate and at page 245 said:

> Such change has been from an irregular-route, territorial service to that performed by an ordinary common carrier over a regular route or routes and between fixed termini.

In the second report upon reconsideration, the Commission reversed the prior decision and held that applicant was entitled to a grandfather certificate over irregular routes between the fixed termini, Atlanta and Greenville. It reasoned that those points were served with sufficient substantiality to show a bona fide operation in the grandfather period and that under the statute the applicant had a right to a grandfather certificate covering the fixed termini between which service had been continued, even though the remainder of the territory had been abandoned and the service between the fixed termini had evolved into a daily operation over the same highways. However, the certificate granted authorized "irregular routes' be-

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cause the applicant had not confined his service to particular highways in the grandfather period.

The Commission case just cited well evidences the inapplicability of the *Maher* case to the questions involved in this case.

III. To apply the theory of the Maher case to the instant case would do violence to the construction given the statute by this Court in cases involving the grant of certificates to common carriers of property over irregular routes.

As stated, the distinction between common carriers of property over irregular routes and common carriers of property over regular routes approved by the lower court relates not merely to the matter of highways used but rather involves the method, quantity, frequency and regularity of service over highways and between points which no one denies is authorized—*provided* the service is performed by different methods and with less regularity. That view attaches a significance to the matter of irregularity in the use of highways which is at variance with the holdings of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480, and *Howard Hall Co.* v. *United States*, 315 U.S. 495, 498.

In the *Carolina Freight Carriers Corp.* case, this Court set aside an order of the Commission which limited the commodities authorized in the case of a common carrier of property over irregular routes. One question was involved as to the extent to which the Commission is authorized to treat irregular-route common carriers of property differently from regular-route common carriers of property. This Court said at page 485:

> The difference between those types of carriers may well justify a sharp delimitation of the far flung ter-

> ritory which an irregular route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier.

The *Howard Hall Co.* case is to the same effect. The construction given the statute by this Court in the cases cited is contrary to the construction for which the appellees contend on the authority of the *Maher* case.

Appellees' argument that the decree below should be affirmed because, if that is not done, the appellants will "eat their cake and have it too" is also at variance with the views stated by this Court in the two cases just cited. The quoted phrase expresses appellees' view that the Commission has granted to carriers over irregular routes broader territorial rights than would have been granted if the operations in the grandfather period had been confined to specified highways. From that premise, appellees argue that an unlimited right to expand the facilities, regularity and quantity of service would give irregular-route carriers an unwarranted advantage over, and greater privileges than are provided for, regular-route carriers. *Alton R. Co. v. United States,* 315 U.S. 15, is cited to support this view.

The certificate involved in that case granted authority to transport automobiles, the carrier being a specialty carrier. It is true that such carriers were given broad territory based on the mere holding out of service, as distinguished from actual or substantial service. However, that was not true of certificates granted to common carriers of general commodities like Brady. The *Alton* case is not in point.

As heretofore stated, Brady's original application sought authority to serve the twenty one points in Minnesota, based on proof of general holding-out and some

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service thereto and from. The certificate finally issued to Brady, which was limited to points to and from which a substantial service was shown, covered only four points in Minnesota, two of them being Minneapolis and St. Paul. The Commission cut down the grant to Brady in recognition of the irregular-route operations which he conducted in this area. In so doing, the Commission conformed to the views of this Court as stated in the *Carolina Freight Carriers* case *supra* and in the *Howard Hall* case *supra*. The *Howard Hall* case is an especially apt example of such cutting down of territory since there a carrier of general commodities sought authority to serve all points within 100 miles from Birmingham over irregular-routes and the Commission cut the radius of the authorized territory down to 10 miles. This Court held that in view of the territorial type, that is, the irregular-route operations conducted by that applicant, the Commission was on sound ground in that action.

IV. The questions presented are novel, substantial and important.

In view of the invalidity of the reasons and authorities cited by the appellees in support of their contention that the first question is insubstantial, it is perhaps unnecessary to deal with the questions which the appellees ignore in their motion. However, so that the Court may be fully advised as to the novelty, importance and substantiality of all of the questions presented by this appeal, each of them is briefly noted below.

Question No. 1: The alleged power of the Commission to treat the irregular-route type of common carrier of property as a carrier of a restricted service type.

This Court has not heretofor been called upon to decide this question in a case which involves the permissible limits

of service which may be rendered by common carrier of property who holds a certificate of public convenience and necessity authorizing service over irregular routes.

In *Application of Kassebaum* (1943), 142 Neb. 645, 7 N.W. (2d) 464, the Nebraska Commission had issued a cease and desist order against an irregular route property carrier like the order in this case. The Nebraska statute contained provisions identical with those found in Sections 203(a)(14), 206(a) and 208(a) of the Federal Act. The Supreme Court of Nebraska struck down that order on the ground of lack of power.

Brady is confident that this Court will be persuaded to a like decision if opportunity is provided to brief the case, to develop the legislative history, and to be heard in oral argument.

Question No. 2: The alleged power of the Commission under Section 204(b) to restrict by classification the service of common carriers of property over irregular routes for the competitive benefit of other common carriers of property which are authorized to serve the same points over regular routes.

Section 204(b) (49 U.S.C. §304[b]) provides that

> * * * the Commission may from time to time establish such just and reasonable classifications * * * of groups of carriers included in the term "common carrier by motor vehicle" * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest.

In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, the Commission issued its classification pursuant to the power conferred in the section just quoted. At page

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709, under the heading "Types of Property Carrier Service—Explanation", the Commission undertook to define regular-route scheduled service, regular-route non-scheduled service, irregular-route radial service and irregular-route non-radial service.[7] That "Explanation" does not

[7] Such explanations read as follows:

(A) *Regular-route scheduled service.*—A regular-route scheduled-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation between fixed termini and over a regular route or routes upon established or fixed schedules.

(B) *Regular-route nonscheduled service.*—A regular-route nonscheduled-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation between fixed termini and over a regular route or routes at intermittent intervals and not upon an established or fixed schedule.

(C) *Irregular-route radial service.*—An irregular-route radial-service carrier is any persons who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity, or permit, or from any point located within such radial area to such carrier's fixed base point or points.

(D) *Irregular-route nonradial service.*—An irregular route nonradial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes between points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessary, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation.

purport to define types of property carriers over irregular routes in the terms of the criteria or characteristics used by the Commission in the instant case. In fact, insofar as irregular-route service is concerned, no word or phrase is used which relates even indirectly to methods, frequency, periodicity, regularity or quantity of service.[8]

On the face of it, the quoted provision does not purport to confer any power on the Commission to limit permissible service under a certificate. To read such a power into this provision would not be consistent with the "grandfather" clause of Section 206(a) (49 U.S.C. §306[a]).

Nevertheless, the Commission and the lower court rely heavily on the section above quoted and the order entered in the Commission case just mentioned. (See conclusions of law Nos. 3 and 4 of the lower court, pp. 25-26 of Statement as to Jurisdiction). This is also true as to the opinion of the lower court in the *Falwell* case.

The legislative history shows that such a construction of the statute was never intended by Congress. This is borne out by the statements of Mr. Eastman as Federal Coordinator of Transportation in recommending the section, and the statement of Senator Wheeler in reporting the bill to the Senate, both of which are quoted in the margin.[9]

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[8] It is worthy of note that in the classification quoted in footnote 7, the Commission set up two classes of regular-route carriers of property, the only difference being in the matter of established or fixed schedules, a true service characteristic. Despite that classification, the Commission said in its report in the instant case (47 M.C.C. 23, 36):

> . . . any carrier of property authorized to operate over any described regular route lawfully may establish thereover either a scheduled or a nonscheduled service.

[9] In explanation of this section, the Coordinator in his report of January 21, 1935, said (H. Doc. 89, 74th Cong., 1st Sess., p. 60):

> The provision empowering the Commission to classify common or contract carriers, respectively, into distinctive groups

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This Court has not heretofor construed Sec. 204(b) of the Motor Carrier Act, 1935. The construction of that section presents a novel, important and substantial question.

Question No. 2 also involves the lawfulness of the policy of regulation which the Commission asserted and followed in the instant case. At page 23 of its report in 47 M.C.C.,

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according to the special nature of their services, and to provide regulations for such classes or groups which are appropriate to their operations and consistent with the public interest, is of special significance in the case of motor-carrier operations. This provision, coupled with others which give the Commission a broad measure of administrative discretion, has in view the fact that the motor-carrier industry embraces many specialized types of carriers whose operations are not conformable to a single pattern of regulation and the need, in the public interest, of a form and degree of regulation sufficiently flexible to assure the proper development of motor transportation. This provision for classification or grouping of motor carriers has a particularly important relation to the regulation of contract carriers.

In reporting to the Senate, Senator Wheeler said (79th Cong. Rec., p. 5879):

> This paragraph is of great importance. It enables the Commission to classify carriers performing special and distinct types of service, such as hauling of milk, livestock, furniture, petroleum products, newspapers, and so forth, and to vary the regulatory requirements as to rates, records, reports, and other matters in accordance with the nature of the service and the public need. These provisions will promote flexible administration and enable the Commission to avoid imposing unnecessary burdens. It is to the interest of carriers, shippers, and the public that this paragraph be retained.
>
> I think that this is an exceedingly important paragraph, because of the fact that the Commission may find, for instance, that persons who are engaged simply in hauling furniture need one kind of regulations or rules that may be prescribed. Another classification may be those who are engaged in hauling oil or gasoline, and a certain type of regulations may be necessary for them. This paragraph gives to the Commission the power to handle those matters.

the Commission gave the following as a policy reason for seeking to restrict the method, frequency and quantity of the service rendered by Brady over irregular routes:

> • • • It is imperative that they be so limited if, consistently with the national transportation policy, regular-route operators, between points between which ample regular-route service is already being furnished, are to be protected from destructive competition. As seen, these carriers cannot move to other territory and without the protection from uncontrolled competition, which the act contemplates, their services might be adversely affected, possibly even to the point of destroying them, to the public detriment. Possession by irregular-route carriers of any such right, indiscriminately and at will to invade the fields of service of regular-route carriers, would largely nullify section 207 of the act, and our ability to carry out our duties of regulation in the public interest would be seriously impaired.

In *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 485-6, this Court struck down an order of the Commission which was based, at least in part, on a policy of regulation identical with that declared in the above quotation from the Commission's report in the instant case.

Question No. 3: Does not the proviso in Section 208 (a) of the Motor Carrier Act, 1935, specifically withhold from the Commission the power sought to be exercised by its report and order in the instant case.

In *Nudelman Common Carrier Application,* 28 M.C.C. 91, 93, and *Pittsburgh-Weirton Bus Co., Inc., Common Carrier Application,* 10 M.C.C. 266, 270, the Commission recognized that the proviso in question withheld from it the power to attach limitations to the permissible *quantity* of service which might be rendered by a common carrier between authorized points under a certificate. Yet, the

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order against Brady is predicated on tests and limitations which have only one purpose, to restrict characteristics which relate directly to the amount of service rendered. To claim that such tests and limitations are merely characteristics of a "type of service" does not obscure the fact that they are quantitative restrictions and as such beyond the power of the Commission to impose.

The legislative history of the proviso in Sec. 208(a) is particularly significant in the instant case. In the draft of the bill which the Federal Coordinator of Transportation recommended to Congress, the Commission was authorized to impose terms and conditions as to "the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory." That bill was amended by striking out the quoted words and substituting in lieu thereof, the proviso presently found in Section 208(a). In reporting this change in the bill to the Senate, Senator Wheeler said (79th Cong. Rec., p. 5881; italics supplied):

> Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) by striking out lines 14 to 16, page 26—("the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory")—and by adding a proviso which permits operators to add to their equipment and facilities as business conditions may require, *provided they do not go beyond the route or routes or outside the territory specified in their certificate.* There was objection to the provision as it came in by a great many, so the committee amended it to meet the objection.

The proviso in Sec. 208(a) was not involved in the *Maher* case, it was not noted by the lower Court in the *Falwell* case, and it is brushed aside in the opinion of lower court in the instant case with a mere statement of disagreement (p. 17 of Statement as to Jurisdiction).

The construction of the proviso in Sec. 208(a) presents a novel, important and substantial question on which the parties should be heard by this Court.

Question No. 4: Is the order of the Commission sufficiently certain to comply with due process.

The formal portion of the order entered by the Commission[9] makes the report a part of the order and requires Brady to cease and desist "from the motor carrier operations which it is found in said report now to be conducting without appropriate authority from this Commission, and to abstain from a resumption of such operations, * * *". If Brady fails to take whatever action is necessary to comply with that order, he becomes subject to the special penalty provided by Section 322 of the Motor Carrier Act, 1935, (49 U.S.C. § 322). Consequently, this important question is presented: Assuming the statute grants the Commission the power sought to be exercised in this order, is that order sufficiently certain to constitute due process?

That order has the force of a statute to establish the illegality of the Act which is prohibited thereby. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 386. Its validity must therefor be tested by the same criteria as would be applied to a statute.

In its report, the Commission told Brady he could comply by the following alternative methods; he could either abandon all of the eight practices found to consti-

[9] Quoted in the margin on p. 20 of the Statement as to Jurisdiction.

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tute the criteria of unauthorized irregular route operations or he could "at his peril" make a lesser change in the operations (47 M.C.C. at p. 56). In *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, this Court said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

See also *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 393.

This is the first case in which the Commission has issued a cease and desist order of the character involved in the instant case. The constitutionality of that order presents a novel, substantial and important question.

Question No. 5: Assuming the statute confers the power claimed by the Commission, is the classification imposed as to types of carriers so arbitrary and so without reasonable or just relation to the intended result of the legislation as to constitute lack of due process.

If the statute be construed as claimed by the Commission, the lower court and the appellees, it imposes restrictions on the amount of service of irregular-route carriers which are not imposed on regular-route carriers between the same authorized points. If the statute must be so construed, it should be held unconstitutional because such a classification is arbitrary and has no just or reasonable relation to the intended result of the legislature. See *Smith* v. *Cahoon*, 283 U.S. 553, 567; *Southern R. Co.* v. *Greene*, 216 U.S. 400, 417; and *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 39.

The Commission's theory is that the imposed classification is necessary to prevent unrestrained increase in competition. But an unrestrained increase of service between

authorized points by carriers in either category will produce a like amount of added service and a like amount of added competition for the available traffic. The added competition is no more destructive in the one case than in the other.

There is nothing in the Motor Carrier Act, 1935, which evidences an intent on the part of Congress to make a favored class out of regular-route carriers of property, that class to be specially protected against added competition from carriers of property over irregular routes. It thus appears that the Act, if construed as the Commission claims, is so discriminatory, arbitrary and injurious that it violates the due process clause of the Fifth Amendment. *Detroit Bank* v. *United States*, 317 U.S. 329, 338.

Conclusion.

The appellant respectfully submits that the questions presented in this case are important and substantial. Much is at stake from the standpoint of the public generally as well as from the standpoint of Brady's private rights. The motion of appellees for summary affirmance should be denied.

Respectfully submitted,

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